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No. 10

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

v.

SEABOARD AIR LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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"varies from moderate to heavy * * * the heavy traffic occurring at hours which do not coincide with the usual hour for movements along the tracks here involved, but there are no scheduled movements" (R. 10); that there was no evidence that the movements complained of or similar movements have interfered with a fire department and emergency station on one of the cross streets a few hundred feet from the track (R. 10–11); that all movements within the "yard limits" are under the direction of respondent's "agent" (R. 11); that on the second and fourth movements some of the cars were ahead of the engine (R. 11); that there was no perceptible grade on the track involved (R. 11); that the respondent's rules prohibit speed in excess of that permitting a stop within half the range of vision (R. 11–12); that in the past 27 years there had been only four crossing accidents, *i.e.*, two in 1941, one in 1944, and one in 1954,[4] and that there had never been an injury to an employee on a movement between the classification yard and the industrial plants or spurs (R. 12); that for the respond-

In the letter order of April 4, 1957, the judge had stated that "the safety record of [respondent] and the added cost of operation are not controlling", but assumed that they "are worthy of consideration" along with "other facts" (R. 7). He included, as facts which he had considered in determining whether a "train" was here involved, "the number and nature of the grade crossings," and "the physical aspect of the yard and the operations" (R. 8).

[4] The accidents were collisions with automobiles. Three of the accidents involved trains that did not have their air brakes coupled (R. 39).

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enact the legislation. Considerations which had been used by this Court to illustrate or to give force to the broad congressional standard that power brakes must be operated on "any train" have been lifted out of context and given improper status as criteria of what is a "train," *e.g.*, the number and nature of grade crossings, the use of the "main" line, substituted precautions, etc. Under this indefinite and subjective approach, the district court below noted, decisions have been rendered on the particular facts of [each] case," "a holding in one case carries little weight as a rule for a decision in another," and "the opinion of one judge or court is likely to be as good as that of another" (*infra*, p. 43). This is not a proper application of the four decisions in which this Court laid down a clear and precise construction of Congress' use of the term "train" as any movement of an assembled unit of engine and cars for an appreciable distance without coupling or uncoupling. If the railroads believe such a broad requirement to be unnecessary as a matter of safety, or economically unsound, the contention is one to be addressed to the Congress. Until Congress changes this law, on the books for over half a century, the courts should not do so.

II

The essential error in the majority decision below is in its persistent departure from the question of what is a "train" and the consideration, instead, of questions of safety which were for the Congress alone to appraise.

A. The respondent's operations did not consist of switching. They involved runs of trains in no instance

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OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 64–81) are reported at 258 F. 2d 262.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (R. 82). On September 23, 1958, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to and including November 28, 1958 (R. 83). The petition was filed on November 26, 1958, and was granted on January 12, 1959 (R. 83). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

as failure to comply with any requirement of this section.

The order of the Interstate Commerce Commission, dated June 6, 1910 (49 C.F.R. 132.1), provided:

> On and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated.

STATEMENT

In a suit for statutory penalties filed in the United States District Court for the Eastern District of Virginia, the United States charged the respondent, in four separate counts, with the operation of four trains without coupling the power brakes, in violation of the Safety Appliance Act (R. 1–5). The respondent, in its answer, admitted the respective operations but contended that they were switching operations, not train movements (R. 5–6).

The facts may be summarized as follows:

The respondent has established in the city of Hopewell, Virginia, a yard known as its "classification or assembly yard." Trains to or from Hopewell use this yard for breaking up or assembly. A track extends through the city of Hopewell for a distance of approximately two miles, from this classification yard

to the tracks of the Allied Chemical and Dye Company and Continental Can Company plants, making, en route, an interchange connection with the Norfolk & Western, and crossing, at grade, five streets (one of which is Virginia State Route 10), two private roads, and four tracks of the Norfolk & Western Railroad. The track is also used by engines of Allied Chemical for short distances near the Allied Chemical plant. Nine industrial sidings or spur tracks branch off between the classification yard and the Allied Chemical and Continental plants. After an incoming train has been broken up in the classification yards, an engine is coupled to the cars which are to be delivered and the cars consigned to customers of Seaboard are hauled along the two-mile track to the appropriate spur (R. 9–10).

In September, 1951, inspectors of safety appliances for the Interstate Commerce Commission advised the respondent that air brakes were required to be coupled and in operation on movements from the classification yard to the Allied Chemical and Continental plants. Thereafter, the brakes on cars engaged in such operations were coupled (R. 50). However, in January, 1956, the respondent discontinued the coupling because of "the time element" that was involved, because of a 30 per cent increase in business in the area, and because of the respondent's conclusion that "there was no undue or unusual risk" (R. 54–55).

In March, 1956, the inspectors visited the area and observed the four admitted failures to couple brakes which gave rise to the four counts, as follows:

1. On March 5, 1956, a locomotive and 26 cars went as a single unit, without stops, from the track of the Allied Chemical plant two miles to the classification yard (R. 2, 5, 11, 15, 17–18).

2. On March 5, 1956, a locomotive and 28 cars went as a single unit, without stops, from the classification yard two miles to the track of the Allied Chemical plant (R. 2–3, 5, 11, 15, 23–24).

3. On March 5, 1956, a locomotive and 29 cars went as a single unit, without stops, from a track near the Allied Chemical plant to the Norfolk & Western interchange track, which is about midway between the plant and the classification yard. There, the locomotive was detached, coupled to 20 additional cars on the interchange track, and then recoupled to the 29 cars. The total of 49 cars was taken intact, without stops, the distance of approximately a mile to the classification yard (R. 3, 5–6, 11, 15, 25–26).[2]

4. On March 6, 1956, a locomotive and 23 cars went as a single unit, without stops, from the classification yard for two miles to the track of the Continental Can plant (R. 4, 6, 11, 15, 26–27).

The foregoing movements were at speeds of 4 to 13 miles per hour (R. 11, 18, 24, 26–27). No cars were picked up or set out, except for the single pickup of 20 cars noted above in the third case; no sorting, selecting, or classifying of cars occurred on the line

[2] The court finding placed the interchange track at "approximately half way" between the plant and the classification yard (R. 11). Inspector Meyrick testified "approximately midway * * * closer to Hopewell yard" (R. 26). Inspector Roy testified to the shorter distance of 2087 feet from the interchange to the classification yard (R. 42, 44).

between the classification yard and the tracks (R. 11, 17, 24–27). The crews knew that the operations were to be uninterrupted runs before the trains started (R. 49, 59).

The district court rendered judgment for the defendant, holding that only "shifting movements" were here involved (R. 12, 14). The judge concluded that "[n]o absolute standard is available for determining whether a particular movement is a train movement * * * or whether it is a shifting movement * * *. Instead, each case must be decided on its merits, giving full consideration to the purpose behind the statute and its implementing regulations and all pertinent facts" (R. 12).

In a letter order of June 28, 1957, the judge adopted the findings submitted by the respondent railroad (R. 13), which included the following: that the respondent designated as within "yard limits" not only the classification yard but also the two miles of track through Hopewell between the classification yard and the tracks of the Allied Chemical and Continental plants (R. 9); that Norfolk & Western, on the track used for interchange of cars with the respondent, did not couple the brakes (R. 10); that Norfolk & Western tracks crossing respondent's track at grade were used "to serve industries only" and that signs on the former's tracks gave the respondent's trains the right of way (R. 10); that street crossings were provided with warning devices to travelers on the highways and that a watchman was stationed at one street crossing (R. 10); that traffic over the private crossings "is generally light"; that traffic over the street crossings

ent to connect the air brakes on such movements "would result in a delay of approximately forty minutes in each movement and entail an additional annual expense of $30,000 for wages alone, and other expenses" (R. 12); and that the movements "would not have been less hazardous to employees or the public if air brakes had been coupled and used" (R. 12).

The Court of Appeals for the Fourth Circuit affirmed, Chief Judge Sobeloff dissenting. The majority opinion stated that there was no difference in the "nature of the work" between a run which worked every spur along the two-mile lead track and one which did not; that the business on the track was the "distribution" of cars from trains which had completed their "over-the-line run" and the assembly of cars into "outgoing" trains (R. 67–68). The court distinguished the operations involved here from "the fast, through train" and "movements between major terminals", "movements * * * over main line tracks" (R. 68–69), and "line haul" (R. 70). It reasoned that, under the circumstances, two miles was not "an unreasonable distance to travel without train brakes" (R. 70).

Chief Judge Sobeloff, dissenting as to counts 1, 2 and 4 on the basis of a full survey of this Court's decisions in the field, particularly alluded to the absence of stops in the movements and the consequent impropriety of judging the specific trips by the fact that, upon other occasions, shorter runs and true switching operations might occur on the particular track (R. 72–73).

SUMMARY OF ARGUMENT

I

The Safety Appliance Act requires power brakes in operation on "any train." The respondent's failure to have power brakes in operation on four completely assembled trains, consisting of engines and 26, 28, 29, and 23 cars, respectively, in unbroken runs of two miles in three cases, and over a mile in the fourth, was a violation of the statute since, as held in the four decisions on the subject by this Court, the term "any train" includes any movement of an assembled group of cars with an engine for an appreciable distance without coupling or uncoupling cars.

A. The statute applies to "any train." When Congress chose to make an exception, it did so in specific language in the case of logging trains and trains of four-wheel cars, and it did not leave it to the courts to determine that they were not "trains" merely because considerations of danger and expense might be thought to justify exceptions. Notably absent from the statutory language is any exception for "switching." Obviously, in a true switching operation of an engine shunting one car or a few cars for short distances, involving coupling and uncoupling, there is no running of a "train." There is, however, no statutory exemption of "switching operations" or "shifting operations" as such, much less any further exemption of any run of an assembled train that can be related to "switching" because the run was preceded or followed by switching—as all runs must be—or because the train runs over trackage used *at other times* by

other, unassembled units for the brief, limited, operations of actual switching.

B. The primary purpose of the legislation was to end deaths and injuries of train employees, which had occurred in the years preceding 1893 by reason of falls from cars by men required to go atop those cars to operate the handbrakes. The danger was intended to be substantially eliminated by progressively increasing the percentage of cars having power brakes operated by the engineers. The power-brake requirement was intended also to reduce the danger to other employees from the stopping of a train containing substantial numbers of unbraked cars, since these cars jolted forward through the slack in a chain-reaction of increasingly violent impacts which threw men from the cars.

The peculiar dangers to employees sought to be mitigated by use of power brakes are as great whether a train is run to a terminal or to an industrial plant. The legislative history negates any intent to restrict the application of the Act to the "main" line or to "road" haul. The hearings disclose that use of the word "line" did not mean "main" line, for handling of trains in yards was also contemplated. Moreover, freight trains were more the subject of safety needs than passenger trains (as to which more care was already being taken), and freight trains typically would be employed in various runs to such destinations as industrial plants off the "main" lines.

C. This Court, in its four decisions on the subject, specifically held so-called "transfer" trains to be sub-

ject to the power-brake requirements, and rejected efforts of the railroads to base exceptions on the absence of danger in particular operations or locales. The decisions arose out of efforts of the railroads to narrow the concept of a "train" by expanding the government's own recognition that an engine engaged in actual switching of one or a few cars was not a "train." The railroads, ignoring the fact that the distinction lay in the smallness and short-lived nature of an actual small switching operation, sought to exclude virtually anything that could remotely be related to switching.

1. This Court, in the first two cases, *United States* v. *Erie R.R. Co.*, 237 U.S. 402, and *United States* v. *Chicago, Burlington & Quincy R.R.*, 237 U.S. 410, rejected contentions that runs of assembled units of engines and cars were not covered by the safety requirements for "trains," when the runs were between yards at which the trains had been or would be assembled or broken up. Also rejected were contentions that designations of separated areas as a single yard required operation between those areas to be characterized as taking place within a yard.

2. In *Louisville & Jeffersonville Bridge Co.* v. *United States*, 249 U.S. 534, the Court held a run of an engine and 26 cars for a distance of over three-quarters of a mile from one yard to another to be the run of a "train" and recognized a distinction only for "a sorting, or selecting, or classifying" of cars, involving coupling or uncoupling, and the movement of "one or a few at a time for short distances" (249 U.S. at 538–539). In the *Louisville* case the train was moved back-

ward as well as forward in the course of its run. In construing the statute, the Court specifically refused to consider "what other precautions will equal, in the promotion of safety, those prescribed by the act" (249 U.S. at 539).

3. In *United States* v. *Northern Pacific Ry. Co.*, 254 U.S. 251, the Court directly held that a movement need not be over "main" line tracks to constitute the running of a train. Moreover, the fact that the tracks there involved had a switchyard along the route, as well as at each end, did not make a switching operation out of the four-mile runs of trains of 40 to 48 cars which did not use intervening switching facilities, even though those facilities were used at other times in other movements.

4. This Court's four decisions accordingly establish a clear definition of a "train" and preclude judicial reappraisals of the safety factors existing in particular sites. They also preclude consideration of what is done with the trains before or after the runs. The purpose of the legislation being remedial—the promotion of the safety of railroad employees and the public—liberal construction is warranted and given by this Court. Under that construction, respondent's actions here are clearly stamped for what they are—the running of "trains."

5. However, some courts of appeals have drifted, with the passage of the years, into reasoning—and upon occasion, holdings—confusing the question of what constitutes a "train" with the appraisal of the numerous elements of danger which induced, or were supposed by a court to have induced, Congress to

numbering less than 23 cars, and traveling unbroken distances of at least two miles in three cases and more than a mile in the other case. By no stretch of language can these facts be brought within this Court's words relating to the actual work of "sorting, or selecting, or classifying" cars, in movements of "one or a few" cars "for short distances." In the *Louisville* case, in which the Court directly stated the distinction, a movement of 26 cars for three-quarters of a mile was held not to be switching, and power brakes were required. A *fortiori*, here the unbroken movements of from 23 to 29 cars, for at least a mile, and in all but one instance for two miles, were runs of trains.

B. The majority below also erred in considering what was done with the trains before and after their runs. In all four of its decisions, this Court refused to take assembled groups of engine and cars out of the statutory language ("any train") merely because they were transporting cars from one place for switching to another. The instant case involves a situation even less amenable to this repeatedly rejected contention, for in the four prior cases before this Court, there were true switchyards at both ends of each run, whereas here at one end of each trip there was not a switchyard but an industrial plant. The entire train of cars, in each instance, was delivered intact to the ultimate consignee or was received intact from the consignor.

A similar disregard of the rulings of this Court is involved in the consideration given in the majority opinion below to what was done at other, unrelated, times on the same tracks with other cars. The court

states that the "nature of the work, its purpose and character" are "precisely the same" whether "every other spur is to be worked" (R. 67). When cars are being continually coupled and uncoupled, the operation is different from a straight run of a mile or two. The distinction was recognized by this Court in its *Northern Pacific* decision, *supra*, where it was likewise urged that other trains used not merely spurs but a switchyard midway along the route. Here, none of the spurs was worked on the runs in question. Moreover, the situation was not one in which trains moved for the purpose of making numerous pickups and went on through by reason of unexpected contingencies—here the runs were, from the outset, known to be through runs.

C. The court below ascribed to Congress an intention to distinguish between "switching operations" and an "over-the-line run" or a "fast, through train" or "movements between major terminals" or on "main" line tracks. But this language was not used by the Congress. This Court, in its *Northern Pacific* decision, *supra*, unequivocally held to the contrary, stating that "there is nothing in the act which limits the application of the provision here in question to operations on main line tracks" (254 U.S. at 254).

Similarly contrary to the decisions of this Court is the reliance placed by the court below on the factor that the operations took place within yard limits. Clearly, the runs extended far beyond the classification yard itself, since under the undisputed facts the track in question ran for nearly two miles from the

area where the trains were broken up, or assembled, to the plants of the various consignees. And, in any event, both this Court and the appellate courts which have followed its construction have given no weight to the fact that operations occurred within "yard limits."

As for the attempt of the majority below to minimize the dangers of the operations, that type of appraisal is for the Congress alone to make. The courts must decide only whether "any train" was run. Moreover, the majority below, in its attempted assessment of the dangers, substantially overlooked the major emphasis of the legislative history, *i.e.*, the need to eliminate use of hand brakes and the need to protect employees, upon any stopping of the train, against the chain-reaction impact of unbraked cars jolting through the slack. Congress was clearly convinced that a train without brakes in operation upon a minimum percentage of its cars was always subject to numerous potential dangers. Congress wrote no exception into the statute for the various cases in which one or more of the dangers was reduced or absent. It did not exempt trains going at less than a certain rate of speed, or trains moving in supposedly safeguarded areas, or trains having some special purpose such as transporting cars from one yard or terminal to another. Switching operations, as described by this Court, are exempt only when performed in such small units and for such short distances as to be outside the concept of the run of a "train."

ARGUMENT

I

THE STATUTORY REQUIREMENT THAT POWER BRAKES BE IN OPERATION ON "ANY TRAIN" APPLIED TO THE RESPONDENT'S FOUR UNITS, EACH CONSISTING OF AN ENGINE AND CARS COMPLETELY ASSEMBLED FOR AN UNBROKEN RUN OF TWO MILES IN THREE INSTANCES AND OF AT LEAST ONE MILE IN THE FOURTH INSTANCE

Congress, in its safety appliance legislation (*supra*, pp. 2–4), has required that air brake connections be coupled on "any train" used on the railroad's "lines." The government's position is that, in using the term "any train," Congress meant to include every movement of an assembled group of cars with an engine for an appreciable distance without coupling or uncoupling cars. This Court so held nearly forty years ago in a group of four decisions. The Court below and some other circuit courts,[5] have misconstrued the statute by reading into the clear and simple standard of "any train" considerations which have nothing to do with the only question at issue under the statute, *i.e.*, whether a train was assembled and run as a unit, as distinguished from a switching operation.

A. THE STATUTORY LANGUAGE REQUIRES POWER BRAKES IN THE CASE OF "ANY TRAIN" WITHOUT REGARD TO THE AREA WHERE THE TRAIN RUNS

The language employed by Congress in the railroad safety appliance law is inclusive; the brake require-

[5] In addition to this case, there is presently pending before this Court the government's petition for a writ of certiorari (No. 24) to review the judgment of the Court of Appeals for the Seventh Circuit in *United States* v. *Terminal Railroad Association of St. Louis*, presenting similar issues. 260 F. 2d 884.

ment applies to "any" train (*supra*, pp. 2–4). Where Congress chose to make an exception, as it did on two occasions, it did so specifically in the instances—here concededly inapplicable—of "trains composed of four-wheel cars" or "trains composed of * * * standard logging cars * * *" (*supra*, p. 3).[6] In making these exceptions, Congress still referred to the excepted units as "trains." This fact in itself suggests the error in the majority decision below in taking a so-called transfer train out of the scope of the phrase "any train" because of such a train's differences from a "fast, through train" or "main line" haul (*supra*, p. 9). Considering the trains Congress thought it necessary to exempt specifically, it appears that "any train" was designedly used to cover broadly all movements of an assembled group of an engine and cars. Congress made no exception, expressly or by implication, for trains running—or supposed to run—below a certain rate of speed, or for trains operated by personnel designated as "switch" or "yard" personnel, or for trains operating within areas or on particular tracks which a railroad may choose to call a "yard", or for trains running on trackage protected by grade-crossing devices deemed by the railroads to be an adequate substitute for the braking power which

[6] Congress created these exceptions in the original specific proviso of Section 6 of the Act of March 2, 1893 (27 Stat. 532) by amendment on the floor of the Senate (24 Cong. Rec. 1477–1478), stating "nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains", and in an even more detailed exception of logging cars, spelled out in precise language in the Act of April 1, 1896 (29 Stat. 85) (*supra*, p. 3).

the Congress has ordered. Notably absent from the statutory provision is any use of the term "switching operation." As will be shown below, *infra*, pp. 28–39, the government and, later, this Court in its four definitive decisions have believed that the term "train" is inapplicable when an engine is merely shunting "one or a few" cars around for short distances in the actual, direct operation of "sorting, or selecting, or classifying" cars, involving coupling and uncoupling.[7] In the true switching operation, there is no "train." The statute has not, however, exempted "switching operations" generally by using that term. Much less has it exempted any and every run of an assembled train that can be related to "switching" merely because the run was preceded or followed by switching—as all runs must be—or because the train runs over trackage used at other times by other, unassembled, units for the brief, limited, operations of actual switching. Nor does the statute make exemptions under the terms "transfer trains", "drags of cars", or any of the other euphemisms employed by the railroads. This Court has four times rejected the contention that "transfer trains" are exempt (*infra*, pp. 28–39), a necessary consequence of the designedly broad language employed by the Congress. The whole effort below to deny that movements of "trains" were involved, rests, not upon what may be found in the statutory language, but upon a revival of the four-times-rejected contention

[7] Here, of course, there were not "one or a few" cars but assembled trains, none of them less than 23 cars in number, making unbroken direct runs of at least a mile in one case, and over two miles in the others (*supra*, p. 6).

that a train is not a train when it is running upon a track which the railroad chooses to designate as part of a yard or terminal and which connects with some spurs (even though here that track extends out of the actual switchyard for two miles through a town).

The respondent's contention is thus, at the very outset, contrary to the clear statutory language by which the Congress, except for the specific exclusion of logging trains and trains of four-wheel cars, applied the power brake requirements unequivocally to "any train" (*supra*, pp. 2–4). No definition or limitation was provided because none was required for this well-understood term.

B. THE LEGISLATIVE HISTORY OF THE POWER-BRAKE PROVISION DISCLOSES NO PURPOSE TO EXCLUDE "TRANSFER TRAINS"

1. *The primary purpose of the provision was to protect employees*

Congress enacted the main body of the power-brake legislation in 1893, requiring that a sufficient number of cars on any train be equipped with power brakes so that the engineer "can control its speed without requiring brakemen to use the common hand brake for that purpose" (*supra*, p. 2). The legislation was supplemented, in 1903, to provide that a minimum percentage of the cars on any train have power brakes under the control of the engineer,[1] and to require all additional cars with power-brake equipment, beyond those constituting the stated percentage,

[1] The percentage was raised, as more brake-equipped cars became available, from 50 per cent in 1903 to 85 per cent in 1910 (*supra*, pp. 3–4).

have their brakes within the control of the engineer (*supra*, pp. 3–4).[9]

In appraising the contentions of the railroads, repeatedly rejected by this Court, it is important to note that the safety appliance legislation arose, not primarily in relation to matters of general safety such as grade crossings or collisions, but in reaction against a virtual slaughter of employees operating hand brakes on freight trains and engaged in hand-coupling operations. In introducing the legislation on June 27, 1892 (H.R. 9350, 52d Cong., 1st Sess.), the House Committee on Interstate and Foreign Commerce submitted a report disclosing that over a thousand employees had been killed in falls from trains and engines in 1889 and 1890, and over 4,350 injured (H. Rep. No. 1678, 52d Cong., 1st Sess., p. 2). The very title of the report, "Safety of Railway Employes and the Traveling Public", accorded precedence to the problem of safety for the train crew,[10] and the major portion of the report dealt with that problem. While the report adverted to the objective of passenger safety where tracks were in constant use by both passenger and freight trains (*id.*, p. 5), the primary emphasis was upon reducing the need for employees operating hand brakes by going along the tops of

[9] This latter provision, in conjunction with more recent provisions concerning brake requirements in interchange of cars between railroads, now makes the minimum percentage in essence a 100 per cent requirement. *Power Brakes and Appliances for Operating*, 91 I.C.C. 481. See Commission order of May 30, 1945, Docket 13528 (49 C.F.R., 1945 Supp., 132.3).

[10] The same was true of the title of the Act, "An act to promote the safety of employees and travelers * * *" (27 Stat. 531).

cars (*id.*, pp. 1–5). Similar emphasis upon the underlying purpose of protecting *the train crew* appeared in the Senate Committee report (S. Rep. No. 1049, 52d Cong., 1st Sess., pp. 1–4), and in the discussion in the Senate on the day of submission of the report (23 Cong. Rec. 6358). In the testimony in hearings, appended to the Senate report, it was pointed out by a witness that "[m]ore people are killed through the lack of the air brake by falling from the cars * * * than are killed by the couplers" (S. Rep. No. 1049, *supra*, p. 21), and other witnesses repeatedly attested to the inadequate braking of freight cars and the consequent necessity of employees operating brakes from the tops of cars, and in the hurry of emergencies, thereby risking falls and injuries (*id.*, pp. 29–31, 109–110). Statistics on casualties from falling off trains, and discussion of this danger to the train crew, also reappeared in other testimony (*id.*, pp. 47, 53, 97, 109–110), and in the congressional debates (24 Cong. Rec. 1249, 1275–1276, 1287, 1417; 35 Cong. Rec. 7300).

In 1902, Congress considered several problems arising from experience with the 1893 legislation. One of these was the permitted exercise of judgment—and the abuse of judgment—in determining how many cars of a train needed to be within the power-braking control of the engineer to enable him to control the train's speed without requiring brakemen to use the common hand brake (S. Rep. No. 1930, 57th Cong., 1st Sess., pp. 7–8; 36 Cong. Rec. 2268). Another problem, more significant to the present case, was the continuing danger to employees upon stopping of a train containing a substantial number of cars whose power

brakes were not coupled up. The unbraked cars, due to the slack between them, would commence a chain reaction of violent impacts until stopped against the effectively braked portion of the train. The accumulated and unpredictable shock was sufficient to throw men from the trains. In more extreme cases, deaths and injuries came, not alone from falls, but because cars were crushed and wrecks occurred. These contingencies were extensively and repeatedly emphasized during the course of the legislation (S. Rep. No. 1930, 57th Cong., 1st Sess., pp. 7–8, 11–13, 46–47, 51, 95, 108, 115, 142, 145, 153; 35 Cong. Rec. 7300; 36 Cong. Rec. 2519). As stated in the House debate (36 Cong. Rec. 2519):

> Mr. UNDERWOOD. * * * I am willing to leave [to the Interstate Commerce Commission] the power to increase the minimum, but I want to take away from them the power to reduce it. My reason is this: * * * when [the railroads] come to make up their trains, no matter how many cars they have equipped with the air brake, they only couple together the air-brake connections on a few cars in front of the train, and then when they have to stop the train suddenly the other cars behind, which are left uncoupled, come down on the front cars like a battering ram, endangering the lives of the operators of the train.

In short, Congress was legislating primarily for the safety of employees in relation to the basic problem of possible stops, even at slow speeds, resulting in the jarring of men from the cars by the chain of unpredictable impacts of unbraked cars. When an engine is shunting one or a few cars in the brief starts and

stops of a true switching operation, men can remain continuously braced and alert during these brief periods, and can anticipate the impacts of one or two cars jolting through the slack. But human attention cannot remain as alertly focussed on a trip running, as in this case, for over a mile or two miles. In the event of a stop, the chain of jolts from 23 and more cars, all without brakes, is markedly more difficult to estimate, even at slow speed and whatever the ultimate destination. Another consideration—and an obvious one—was the critical importance, in every required sudden stop, of every foot of lessened movement made possible by power braking (S. Rep. No. 1930, 57th Cong., 1st Sess., p. 9; and see R. 80). Emergencies can make the stopping-distance critical even at the slowest speeds, *e.g.*, a man fallen from a train, or an automobile speeding onto a grade crossing.

2. *The legislative history negates any intent that the statutory reference to a railroad's "line" is restricted to the "main" line or "road" haul, or excludes operations within "yard limits"*

The statutory language, in its reference to the railroads' "line" (*supra*, p. 2; see 23 Cong. Rec. 5925), omitted any restriction to "main" line or "road" haul. Needless to say, the additional words could have been employed had there been any intent to effect such a restriction.[11] The reason why this was not done is

[11] That a train is not taken out of the ordinary meaning of the word "train" by reason of the train's being handled in a yard is attested in the following usage of the term, in a written statement by G. W. Rhodes, a member of the Master Car Builders' Association (Office of Assistant General Superintend-

apparent in the first committee report—the power-brake provision was only part of a broad and inclusive program encompassing other safety measures, such as driving-wheel brakes for locomotives, automatic couplers, draw-bar uniformity, and hand-hold irons (H. Rep. No. 1678, 52d Cong., 1st Sess., pp. 4–5). All of these safety measures were required in operations far short of main-line operations. Moreover, the emphasis was on freight operations, not passenger trains. The resolutions of state railroad commissioners and of railway unions demanding federal safety regulation had dealt with "freight" operations (*id.*, pp. 1–2), and the committee had recognized the better equipment of passenger trains and "the comparative immunity from danger of the passengers on railways" (*id.*, p. 7, "SAFETY TO TRAVELERS RECOGNIZED"). Thus, with primary emphasis on danger to train crews in freight operations, there would be no reason to restrict the coverage to "line" operations, which would

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ent, Burlington and Missouri River Railroad), presented in the hearings on the legislation (S. Rep. No. 1930, 57th Cong., 1st Sess., pp. 51–52, 116):

"* * * Under the old conditions [prior to power brakes and automatic couplers] it was not safe to run *trains* as fast as we now do, nor was it safe to switch *or handle* them *in the yard* as rapidly * * * [emphasis added]."

Similarly, the report of the Interstate Commerce Commission, embodied in S. Rep. No. 1930, *supra*, p. 87, used the term as follows:

"* * * [W]ithout the power brake it would be * * * practically impossible, in the great majority of cases [to move these trains] by reason of the difficulty of regulating the movements of the *trains at* stations, *yards* and meeting points * * * [emphasis added]."

not include the many typical runs of freight trains over direct tracks through cities or industrial districts, *i.e.*, to a large industrial plant. There is no indication of any legislative intent to exclude such runs of trains from the statutory safety precautions. Accordingly, the use of the very broad, inclusive term "line", like the use of "any train", represents proper correlation of the congressional language with the over-all legislative purpose. Neither should be rewritten to read "main line" or to exclude operations within "yard limits."

In short, it is clear that the safety of employees was the main source of concern to the Congress. The proponents of the legislation were not concerned alone with the public, which might stray onto tracks or grade crossings or might be involved in wrecks of freight trains with passenger trains on "main" lines. The hazards involved were not merely the sudden needs for stopping within a short space—although there the additional braking power might, upon occasion, be critical, even at slow speed. What primarily concerned the Congress was the more routine hazard that, on an insufficiently braked train, men would be sent atop the cars to use hand brakes, and the danger to the train crew on an unbraked train, that a stop would send the unbraked cars jolting forward in cumulative impacts sufficient to knock a man from the train.

These considerations of safety apply equally when any substantial number of cars is being hauled an appreciable distance, whether in an area designated as a yard or over a "main line," whether the ultimate

destination is a railroad terminal or an industrial plant. Congress was unwilling to trust the judgment of the railroads as to what would constitute minimum adequate safety measures for such a run. The considerations discussed below as to whether other measures might provide equal protection to the employees are not properly for the courts. Congress has fixed the minimum requirements it regarded as essential on "any train."

C. THE FOUR DECISIONS OF THIS COURT ON THE SUBJECT HAVE SPECIFICALLY HELD SO CALLED "TRANSFER TRAINS" TO BE SUBJECT TO THE POWER-BRAKE REQUIREMENTS AND HAVE REJECTED EFFORTS TO MAKE EXCEPTIONS ON THE BASIS OF THE ABSENCE, IN PARTICULAR OPERATIONS OR PLACES, OF ONE OR SEVERAL OF THE DANGERS SOUGHT TO BE AVERTED BY THE CONGRESS

After Congress enacted the power-brake requirement, the railroads sought to minimize its impact by limiting the concept of the term "train." The government itself had recognized that there were movements of cars in switching operations which could not be considered the movement of a "train." A car or two, actually being switched about by an engine, does not in ordinary usage constitute a "train." Nor would such a movement involve the dangers sought to be averted by the Congress. Since only one or a few cars would be involved, the braking power of the engine would be adequate, and there would accordingly be little occasion to send brakemen atop cars to use hand brakes. In the event of an emergency stop, there would be no great weight of cars to increase the distance for stopping, or the

impact of a jolt. Accordingly, these actual direct switching operations were not considered the movement of a "train."

Ignoring the fact that the basis of the distinction lay in the smallness and short-lived nature of the unit involved, the railroads sought to find the distinction almost entirely in a word which Congress had not employed at all, *i.e.*, "switching." The argument was, in effect, that since the small units that were not "trains" were engaged in switching, therefore all operations that could be said to be switching were equally not "trains." Wholly ignored was the cardinal fact that an assembled unit of an engine and cars going a substantial distance is an intrinsically different unit from an engine picking up and dropping cars in a true switching operation.

This Court squarely rejected the railroads' contentions. In the first two of its four decisions on the Safety Appliance Act (*United States* v. *Erie R.R. Co.*, 237 U.S. 402, and *United States* v. *Chicago, Burlington & Quincy R.R.*, 237 U.S. 410), it was not necessary to come fully to grips with the underlying fallacy, since the Court needed only to reject more superficial points, but in the third and fourth decisions (*Louisville & Jeffersonville Bridge Co.* v. *United States*, 249 U.S. 534, and *United States* v. *Northern Pacific Ry. Co.*, 254 U.S. 251) the Court met and rejected the basic contentions that a transfer train was exempt from the brake requirement because of its relation to switching activities, and that the safety requirements should be applied only to "main" line operations.

1. *In its* Erie *and* Chicago, Burlington *decisions, this Court held that runs of assembled units of engines and cars were not outside the safety requirements for "trains" merely because the runs were between yards at which switching had been done or would be done, or because the railroads designated the yards and connecting tracks as a single "yard"*

In both the *Erie* (237 U.S. 402) and *Chicago, Burlington* (237 U.S. 410) cases, *supra*, the railroads relied on the government's treatment of switching operations as not involving a "train" (O.T. 1914, No. 580, Defendant's Br. 29; O.T. 1914, No. 630, Resp. Br. 41), without analyzing the basis and narrow limitation of the interpretation.[12] The railroads sought to equate true switching operations with the running of trains of cars from one locale of switching operations to another.

In *Erie*, the railroad maintained two yards at Jersey City and Weehawken, respectively, and a third at Bergen, two miles and three and one-half miles, respectively, from Jersey City and Weehawken (237 U.S. at 403). While some trains ran from the west through Bergen with only a temporary stop, the greater part of the traffic was broken up or assembled at Bergen and moved between the yards in "transfer trains"—or in the railroads' phrase "drags of cars"—

[12] The dissenting opinion of Judge Hook, when the *Chicago, Burlington* case was in the Court of Appeals, clearly envisaged the limitations on the exemption (211 Fed. 12 at 20-21):

"* * * [I]t is another thing to declare generally that switching operations are without the statute, and then to attribute to that phrase such a broad meaning as to impair the very intent of Congress. * * * [T]he phrase 'switching operations' does not appear in the statute, though that would have been the easy, obvious way had Congress broadly intended to exempt them. * * *"

which ran only between the yards (237 U.S. at 404). The particular trains involved numbered from 17 to 33 cars (O.T. 1914, No. 580, Gov. Br. 5). The principal thrust of the Erie's argument was that only a single yard was involved. It used such language as "one general terminal," "a switching unity," and "a unitary combination system," asserting that no yard limits were designated between the three yards (O.T. 1914, No. 580, Defendant's Br. 19–21). The railroad contended that the main-line tracks, over which "scheduled" trains passed, did not go through "the freight yard" but were separate and ran around it, and that no passenger trains used the tracks over which transfers were made (*id.*, p. 19). It also referred to the slow speeds, the short distances of two and three-and-one-half miles, the absences of cabooses, the differences in markers, the absence of schedule, the control by yardmasters, and the use of switch engines and switch crews (*id.*, pp. 17–19). This Court found it unnecessary to consider the relevance of some of these contentions, since it rejected the factual assertion that only a single yard was involved (237 U.S. at 406) and that main-line tracks were not used, pointing out, as to the latter contention, that the tracks were used by other freight trains, both through and local (237 U.S. at 408).[15]

In this context, the Court's statement, relied upon by the respondent (Br. Opp. 4), that a train consists of "an engine and cars which have been assembled

[15] That the run was over so-called main-line track was, in any event, held to be of no significance in *United States* v. *Northern Pacific Ry. Co.*, 254 U.S. 251, discussed *infra*, pp. 36–37.

and coupled together for a run or trip along the road" (237 U.S. 407) is of no benefit to the respondent, for the Court found such a "run or trip along the road" in a run between railroad yards, at one or both ends of which run the train was assembled or broken up. The "road" is any part of the railroad's line, and not just the "main" line or road.

In the second of this Court's decisions, *United States* v. *Chicago, Burlington & Quincy R.R.*, 237 U.S. 410 (handed down a week after the *Erie* decision, *supra*), similar contentions of the railroad (O.T. 1914, No. 630, Resp. Br. 40, 51 [14]) were rejected. The three trains there involved transported 42, 36, and 39 cars, respectively, between yards two miles apart and, as distinguished from the respondent's trains, both ends of the connecting track—not merely one—led to yards for assembling and breaking up trains. Since the respondent (Br. Opp. 5) emphasizes this Court's statement in the *Chicago, Burlington* decision that "the controlling test" is in "the essential nature of the work done," it may be well to quote the Court's precise language (237 U.S. at 413):

> * * * That [the trains] carried no caboose or markers is not material. If it were, all freight trains could easily be put beyond the reach of the statute and its remedial purpose defeated. Neither is it material that the men in charge were designated as yard or switching crews, for the controlling test of the statute's application lies in the essential nature of the work done

[14] There was an additional argument that hand brakes were not required (*id.*, p. 56).

rather than in the names applied to those engaged in it.

Viewed in its context and in the light of the holding, the test laid down by the Court clearly consisted in appraising what work was being done at the time of the movement in question, and not what work was done before and after the movement. In that light, as we show *infra*, pp. 44–46, the work done by the respondent's trains was clearly the transporting of a train of cars and not an assembling or breaking up of a train.

2. *The* Louisville *case held a run of an engine and 26 cars for a distance of over three-quarters of a mile from one yard to another to be the run of a "train," and recognized a distinction only for movement of "one or a few" cars "for short distances" in the actual work of "sorting, or selecting, or classifying," involving "coupling and uncoupling"*

Since both the *Erie* and *Chicago, Burlington* opinions embodied references to some of the particularly aggravated facets of danger there involved, the next effort by some of the railroads was to argue that, when these particular elements of danger were not present and the movements bore some relation to switching, the movement was not covered by the legislation. In the third case before this Court, *Louisville & Jeffersonville Bridge Co. v. United States*, 249 U.S. 534, a typical operation involved an assembled unit of engine and 26 cars travelling a distance of three-quarters of a mile as follows:[15] the engine pushed the cars the length of the terminal yard, a distance of about 1,800 feet, and then an additional 1,100 feet upon a main line track. The movement was then reversed, the en-

[15] Actually the movements ranged from 12 cars to 32 (O.T. 1918, No. 312, R. 2).

gine now pulling the cars for a distance of 1,300 feet on another main-line track. Again reversing, the train moved 1,300 feet on main-line track, and into another railroad's yard (249 U.S. at 537; O.T. 1918, No. 312, R. 1–3). The railroad argued that travel was never outside one or the other of the yards except for the length of the train at one point, thereby seeking to distinguish the two-mile separation in *Erie* and *Chicago, Burlington, supra* (O.T. 1918, No. 312, Br. for Louisville Co. 5–7). The railroad also argued that the changes of direction precluded consideration of the movement as a running of a train (*id.*, p. 8).

The arguments were rejected by this Court, which definitely stated the distinction between the narrow limits of a switching operation and the running of a train (249 U.S. at 538–539):

> An engine and twenty-six cars, assembled and coupled together, not only satisfies the dictionary definition of a "train of cars," but would certainly be so designated by men in general and in any fair acceptation of the term must be regarded as constituting a train within the meaning of the statute. * * *
>
> The work done with the cars, as described, was not *a sorting, or selecting, or classifying* of them, *involving coupling and uncoupling,* and the movement of *one or a few at a time for short distances,* but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it cannot, therefore, with propriety be called a switching movement.

> * * * This is not only a train movement, but it would be difficult to imagine one in which the control of the cars by train brakes would be more necessary, in order to secure that safety of employees, of passengers and of the public which it is the purpose of the act to secure, by requiring that engineers shall be given control sufficient to stop any train they may be moving, promptly on the first signal or sight of danger. The mere inertia of twenty-six cars, which must usually be loaded, and especially when running 15 miles an hour, would render it impossible to control or to stop them promptly with power-brakes operative only on the engine, and *the ability to use such brakes on the entire train must often mean the difference between safety and serious accident* when running, as here, in a crowded *yard*, across busy city streets and on main line tracks of railroads. [Emphasis added.]

The Court thus established a precise and workable distinction. It did not condition the distinction upon the concurrent presence of the various dangers which it noted as additional. That is clear from the above language and from the Court's further statement (249 U.S. at 539):

> * * * [T]he construction which the act should receive is not to be found in balancing the dangers which would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law and it has repeatedly been held by this court

> that other provisions of the Safety Appliance Act impose upon the carrier the absolute duty of compliance in cases to which they apply and that failure to comply will not be excused by carefulness to avoid the danger which the appliances prescribed were intended to guard against, nor by the adoption of what might be considered equivalents of the requirements of the act. * * *

3. *The* Northern Pacific *decision held that it was not necessary, in order to fall within the definition of a "train," that the movement be over "main-line" tracks or outside "yard limits"*

Despite the Court's clear separation, in *Louisville, supra*, of its observations on various dangers from its statements of the elements which alone were critical under the Act, there was further effort by a railroad in this Court to inject a collateral inquiry as to substitute safety precautions and as to the presence or absence of main-line travel. In *United States* v. *Northern Pacific Ry. Co.*, 254 U.S. 251, the railroad urged that the four miles of tracks over which transfer trains of 40 and 48 cars were run were not main-line tracks and that, accordingly, only exempt switching operations were involved (O.T. 1920, No. 88, Resp. Br. 4–5). The railroad also urged (as in the instant case) that at other times other trains picked up and set out cars at points along the particular tracks (*id.*, p. 7) and that the tracks, together with the yards at each end and the yards along the tracks, were "operated as one yard" (*id.*, p. 7) and constituted "isolated tracks devoted to switching" (*id.*, p. 5).

The Court did not accept the railroad's contention that no main-line travel was involved (254 U.S. 254), but did not stop there. Speaking for a unanimous Court, Mr. Justice Brandeis stated, broadly and unequivocally (254 U.S. 254–255):

> * * * [*T*]*here is nothing in the act which limits the application of the provision here in question to operations on main line tracks.* The requirement that train brakes shall be coupled so as to be under engine control is in terms (32 Stat. 943) applicable to "all trains * * * used on any railroad engaged in interstate commerce." It is admitted that this railroad is engaged in interstate commerce; and the cases cited show that *transfer trains, like those here involved, are "trains" within the meaning of the act. A moving locomotive with cars attached is without the provision of the act only when it is not a train;* as where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains. *Congress has not imposed upon courts applying the act any duty to weigh the dangers incident to particular operations;* and we have no occasion to consider the special dangers incident to operating trains under the conditions here presented. [Emphasis added.]

4. *This Court's four decisions together establish a clear definition of a "train", and preclude judicial reappraisal of the dangers in particular places and judicial consideration of what was done with the trains before or after they had begun or finished their runs*

In the series of four decisions discussed above, this Court established clear and workable rules, as follows:

An engine and a number of cars assembled together constitute a train (*supra*, p. 34); while the movement of "one or a few" cars at a time in the actual, immediate work of "sorting, or selecting, or classifying" cars, directly "involving coupling and uncoupling," is not the running of a "train", but a mere switching of cars (*supra*, p. 34). It is not mere switching of cars when an assembled train moves a substantial distance—*e.g.*, in excess of three-quarters of a mile—even though the movement may be for the purpose of delivering the chain of cars to or from a place where actual switching operations have taken place or will again take place (*supra*, pp. 33-34). The fact that the track over which the train is run is not used by passenger trains, through trains, or scheduled trains, is otherwise not considered "main" line, or is within "yard limits", does not absolve the railroad from the statutory safety requirements (*supra*, pp. 36-37). *A fortiori*, the railroads cannot exclude runs of trains from the safety requirements by equipping the trains with markers different from other trains, by leaving cabooses off such trains, by running the trains with particular personnel or types of engines, by employing special rules as to speed or type of supervision, or by designating the particular track as a part of a yard or terminal or "switching unity" (*supra*, pp. 31-33).

These simple rules are securely grounded in the purpose of this safety legislation, as stated in its preamble, to promote the safety of employees and the traveling public, and the principle that, as a remedial statute, it should be construed liberally to effectuate

its purpose. *Baltimore & Ohio R. Co. v. Jackson*, 353 U.S. 325, 329, 333; *New York Central v. United States*, 265 U.S. 41, 44-45; *Louisville & Nashville R. Co. v. Layton*, 243 U.S. 617, 620; *Lilly v. Grand Trunk R. Co.*, 317 U.S. 481, 486; *Atchison, T. & S.F. Ry. Co. v. United States*, 244 U.S. 336, 343.

3. Some courts of appeals have wrongly misconstrued this Court's decisions.

On the basis of the opinions of this Court (*supra*, pp. 28-39), it could be expected that there would be little further difficulty in recognizing and carrying out the mandate of the Congress. For a time, the courts of appeals, with only a few deviations (discussed *infra*, p. 40 *ff.*), resisted the various efforts to discover a switching operation because of this or that particular

[*] We think it corroborative of this Court's views concerning the essential nature of a transfer train as being a "train," that, in the 1953 rules of the Association of American Railroads for testing of air brake equipment (in effect prior to the instant trial, and since given official status, in amended form and substance, pursuant to the Power or Train Brakes Safety Appliance Act of 1958, 72 Stat. 86; 49 C.F.R. (1959 Cum. Supp.) Part 132), Rule 25(a) provided for initial air-brake tests on all freight trains whereas, when it was the objective to deal only with "road" trains (as in tests other than initial tests, Rule 42(a)), the term "road train" was specifically used. That transfer trains were otherwise included is indicated in the fact that when some reduction in the prior requirements for such trains was to be effected in the rules, this was done specifically, appearing now in 49 C.F.R. (1959 Cum. Supp.) 132.13(e) with respect to "(1) Transfer train and yard train movements not exceeding 20 miles," and "(2) Transfer train and yard train movements exceeding 20 miles * * *." (A copy of the 1953 rules has been lodged with the Clerk of this Court).

facet of a transfer train's locale or operation.[17] But some circuits have issued opinions confusing the question of what constitutes a "train" with the appraisal of the numerous elements of danger which induced, or were supposed by a court to have induced, the Congress to enact the legislation. Considerations which had been used by this Court only to illustrate or give force to its broad standard that power brakes must be operated on "any train," were lifted out of context and given improper status, not as illustrations, but as standards in determining whether a movement was a train movement, *e.g.*, such matters as the number and nature of grade crossings, the use of the "main" line, the substituted precautions, etc.[18] We believe a

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[17] *Chesapeake & O. Ry. Co.* v. *United States*, 226 Fed. 683, 687 (C.A. 4); *United States* v. *Galveston, H. & H.R. Co.*, 255 Fed. 755, 758, and 265 Fed. 266, 267 (C.A. 5), certiorari denied, 254 U.S. 643; *Great Northern Ry. Co.* v. *United States*, 288 Fed. 190, 191 (C.A. 8); *Great Northern Ry. Co.* v. *United States*, 297 Fed. 692, 696 (C.A. 9); *Illinois Cent. R. Co.* v. *United States*, 14 F. 2d 747, 749 (C.A. 8), certiorari denied, 273 U.S. 752; *Chicago & E. R. Co.* v. *United States*, 22 F. 2d 729, 730 (C.A. 7); *Chi., St. P., M. & O. Ry. Co.* v. *United States*, 36 F. 2d 670, 671 (C.A. 8); *United States* v. *Northern Pac. R. Co.*, 54 F. 2d 573, 574 (C.A. 9); *United States* v. *Southern Pac. Co.*, 60 F. 2d 864, 865 (C.A. 9), certiorari denied, 287 U.S. 667; *United States* v. *Southern Pac. Co.*, 100 F. 2d 984, 986 (C.A. 9), certiorari denied, 307 U.S. 633; *United States* v. *South Buffalo R. Co.*, 168 F. 2d 948, 952 (C.A. 2), certiorari denied, 335 U.S. 870; *United States* v. *Panhandle & Santa Fe Ry. Co.*, 203 F. 2d 241, 243 245 (C.A. 5); *United States* v. *Thompson, Trustee, Mo. Pac. R. Co.*, 252 F. 2d 6, 9 (C.A. 8).

[18] The Ninth Circuit, in 1934, in one instance relied on the fact that switching operations preceded and followed the transfer movement (*United States* v. *Great Northern Ry. Co.*, 73 F. 2d 736, 739 (C.A. 9), Judge Wilbur dissenting, certiorari denied, 295 U.S. 752), but returned, in 1939, to holdings consistent with the holdings of this Court (*United States* v. *Southern*

recent opinion based on this erroneous approach is *United States* v. *Terminal Railroad Association of St. Louis*, 260 F. 2d 884 (C.A. 7), pending in this Court

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Pac. Co., supra, 100 F. 2d 984, 986, 988 (C.A. 9), certiorari denied, 307 U.S. 633). See reference to this return, in *United States* v. *South Buffalo R. Co., supra*, 168 F. 2d at 952 (C.A. 2), certiorari denied, 335 U.S. 870.

The Seventh Circuit, found an exception on the basis of an extreme extension of the concept of a "yard" in *United States* v. *New York, C. & St. L. Ry. Co.*, 77 F. 2d 215, 216 (see comment in *United States* v. *South Buffalo R. Co., supra*, 168 F. 2d at 952 (C.A. 2), certiorari denied, 335 U.S. 870). In later cases it placed great weight on the degree of danger involved (*United States* v. *Elgin, J. & E. Ry. Co.*, 182 F. 2d 1; *United States* v. *Chicago, B. & Q.R. Co.*, 199 F. 2d 223, certiorari denied, 345 U.S. 908). As pointed out in the dissenting opinion of Chief Judge Sobeloff, below (R. 80-81), this Court's holding in the *Northern Pacific* case, 254 U.S. 251, was apparently overlooked in the *New York, C. & St. L. Ry. Co.* decision of the Seventh Circuit, *supra*, while in its *Elgin* case, the Seventh Circuit sought to distinguish *Northern Pacific* on the basis of the number of grade crossings, and in its *Chicago, B. & Q.R. Co.* case, again left this Court's *Northern Pacific* decision "undistinguished and unmentioned" (R. 81). The critical *Northern Pacific* decision, *supra* (pp. 36-37), was likewise left undistinguished and unmentioned in three of the four district court opinions cited by the majority below (*United States* v. *Pennsylvania R. Co.*, 80 F. Supp. 965 (D. Md.); *United States* v. *Great Northern Ry. Co.*, 103 F. Supp. 889 (W.D. Wis.); and *United States* v. *Staten Island Rapid Transit Ry. Co.*, 151 F. Supp. 911 (E.D.N.Y.)). In the fourth decision (*United States* v. *Texas & N.O.R. Co.*, 13 F. 2d 429 (S.D. Tex.), an entirely different factual basis was involved, *i.e.*, the shunting, within a mile, of 27 cars to 18 industries, the cars thus "constantly being cut out and in again" at about "every 100 yards or so" in the actual operations in question and not just before and after the runs (13 F. 2d at 431). This decision, we think, affords no support to the majority view below but, instead, emphasizes by contrast the true status of the respondent's movements here as runs of trains.

on the government's petition for certiorari (No. 24, this Term). The distances of travel without picking up or setting out any cars ranged from one and three-quarters miles to two and three-quarters miles, and the number of cars was 27, 25, 37, and 18, respectively (260 F. 2d at 885-886). The court, in a brief opinion, noted that the movements did not involve use of main-line tracks, that a yardmaster was in control, and that switching crews and switch engines were employed (260 F. 2d at 885). The court did not refer to the pronouncements of this Court on these matters in its *Northern Pacific* and *Erie* decisions, *supra*, pp. 30-32, 36-37. The court cited the *Northern Pacific* decision, without reference to its facts or holding, for language concerning switching of cars within railroad yards "for the purpose of making up a train" (260 F. 2d at 886), and relied, without detailed comment, upon its own prior decisions in the *Chicago, Burlington* and *Elgin* cases, discussed in footnote 18, *supra*, pp. 40-41 (260 F. 2d at 886).

Even some of the decisions in the courts of appeals which have reached the correct result, holding power brakes to be required, have done so on the basis of an appraisal of the dangers of the particular spots rather than by following the congressional mandate that every train movement have power brakes in full operation, *e.g.*, *United States* v. *Panhandle & Santa Fe Ry. Co.*, *supra*, 203 F. 2d 241, 246 (C.A. 5). The result has been fairly accurately described by the district judge in this case (whose decision the majority below affirmed) (R. 7-8):

> * * * [C]ourts have accomplished little other than to decide on the particular facts of the case whether the movement was that of a train within the meaning of the Act. It is apparent, therefore, that a holding in one case carries little weight as a rule for decision in another. Even when the facts of the case are disclosed, the question must depend largely upon the opinion or judgment of the court called upon to make the decision. And where the facts bring the case within the twilight zone, as we think they do in the cases before us, the opinion of one judge or court is likely to be as good as that of another."

The statute, as interpreted by the four decisions of this Court, is not properly subject to this characterization. It is capable of precise application. This Court recognized the Congressional mandate that any movement of an assembled group of cars with any engine for an appreciable distance without coupling or uncoupling of cars is the movement of a "train" and requires power brakes. If the railroads believe such a requirement is economically unsound or oppressive, it is to Congress that they should address their arguments. Congress believed such a requirement was necessary for the safety of the public and even more for the safety of railroad employees.

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[1] This language was quoted by the district judge from a Seventh Circuit decision (*United States* v. *Chicago B. & Q.R. Co.*, 199 F. 2d 223, 226), one of the cases in which that circuit, as observed *supra* (pp. 10, 11, fn. 18), diverged from the holdings of this Court and exempted transfer trains from this safety legislation.

II

THE COURT BELOW ERRED IN ABANDONING THE TEST OF WHETHER A "TRAIN" WAS INVOLVED, AND IN DECIDING INSTEAD ON THE BASIS OF THE ABSENCE OF "MAIN" LINE TRAFFIC AND OF SPECIFIC ELEMENTS OF DANGER

When the proper standard, fixed by this Court, is applied to the operations at issue here, we think it becomes clear that on all four counts violations by the respondent were proved.

A. THE RESPONDENT'S OPERATIONS DID NOT CONSIST OF MERE SHUNTING OF "ONE OR A FEW" CARS IN ACTUAL "SORTING, OR SELECTING, OR CLASSIFYING," BUT INVOLVED RUNS OF TRAINS IN NO CASE NUMBERING LESS THAN 23 CARS AND TRAVELING UNBROKEN DISTANCES OF AT LEAST A MILE IN ONE INSTANCE AND TWO MILES IN THE OTHERS

In the four assembled units of engine and cars here involved, the number of cars was in no case less than 23 cars and the distance of unbroken travel was in no case less than a mile. Specifically, one engine and 26 cars made an unbroken run of over two miles. The second, with 28 cars, and the fourth, with 23 cars, also made unbroken runs of two miles, and the third, with 29 cars, made an unbroken run of over a mile.

Indeed, the description of this last run as for only a mile is ultra-conservative. A mile was the approximate distance of the indisputably unbroken run from the Allied Chemical plant to the Norfolk & Western interchange point, and we have treated it as the total run. But after a single group of additional cars was picked up at this one stop, the train proceeded with its original cars and the additional 20 for the remainder of the run, for an actual total of two miles, the

last portion with 49 cars. We do not, by our statement of cars and mileage, concede that a train ceases to be a train at the instant of merely a single pickup. It is, for example, common practice even for through passenger-trains to pick up and set out cars. Thus, on one line, Washington-Chicago trains set out and pick up cars at Pittsburgh and pick up and set out cars from or to Wheeling at Willard, to say nothing of the dropping off and picking up of lounge cars and diners (Official Guide of the Railways, June 1959, p. 361). But this comparatively minor activity could scarcely change the essential nature of the run as a Washington-Chicago run of a "train" nor would it permit lessened safety requirements. Accordingly, in the instant case, while we understand the caution in the dissenting opinion of Chief Judge Sobeloff, in excluding the third train from his dissent (R. 81), we believe that such exclusion is unnecessary in light of the undisputed distance of a mile even to the Norfolk & Western interchange track and in view of the fact that this single pickup scarcely involved the "frequent" coupling and uncoupling of the brakes to which reference is made elsewhere in the dissent (R. 78).[*]

The operations of the respondent were the running of trains. By no stretch can the facts be brought within this Court's designedly narrow language distinguishing a mere switching operation as a movement

[*] The majority opinion (at R. 67, fn. 3) cites the railroad's records to the effect that another movement may also have involved an intervening pickup but the finding of fact by the District Court (R. 11 paragraph 11), as pointed out by Chief Judge Sobeloff, resolved this conflict of testimony (R. 73, fn. 1).

of only "one or a few" cars "for short distances," nor can it be said that such transporting of whole trains of cars constitutes the actual "work" of "sorting, or selecting, or classifying" cars. *Louisville & Jefferson Bridge Co.* v. *United States*, *supra*, 249 U.S. 534, 538. Were there any possible doubt of the applicability and conclusiveness of the *Louisville* standard here, it need only to be recalled that in that case this Court considered—and treated as a "train"—an engine and 26 cars, traveling only three-quarters of a mile, the run involving a pushing forward, a pulling back, and additional stops and changes of direction in transporting the train from one switchyard to another (*supra*, pp. 33–36).

B. WHAT WAS DONE WITH THE TRAINS BEFORE OR AT THE END OF THEIR RUNS OR BY OTHER CARS AT OTHER TIMES IS IMMATERIAL

In all four of its decisions this Court refused to take assembled groups of cars-and-engine out of the statutory language "train" merely because they were transporting cars from one place for switching to another (*supra*, pp. 30–37). The Court refused to recognize as controlling that the train had been assembled just before the trip in question and that it would be broken up at the end of the trip. The instant case involves a situation even less amenable to exception than the four decisions in which this Court rejected the railroads' contentions. In those cases, there were true switchyards at both ends of each run, whereas here one end of the trip was, in each instance, not a railroad yard but an industrial plant. The entire train of cars, in each instance, was delivered intact to the ultimate consignee or was received intact from the con-

signor. Only at one end of each run was there contact with a railroad classification yard, or in the case of the third run, contact with an interchange track to add cars (*supra*, pp. 4–7). Since this Court, in the four decisions discussed *supra*, rejected the attempted classification of a trip between two switch-yards as a switching operation, there is even less basis for such a description here when one end of the trip is a beginning or end common to every ordinary freight run, *i.e.*, the receipt of the chain of cars from the consignor, or the delivery to the ultimate consignee. The majority below, in effect, applied the reasoning concerning "transfer" trains and the unlimited breadth of "switching operations" that was rejected in the first of the decisions of this Court (*supra*, pp. 9, 30).

The court below repeatedly refers to direct, unbroken transportation of cars to an independent company's plant, two miles distant from the yard, as a "distribution" (R. 65, 67, 69)—a word carrying some of the connotation of a small switching procedure. A more appropriate term would probably be "delivered." But the really significant fact is that there was an unbroken run of a mile or two before any action that could be characterized as switching. That, under this Court's decisions, was the movement of a train.

A similar disregard of the rulings of this Court is involved in the consideration given in the majority opinion below to other operations at other times over the same tracks. The court asserts (R. 67):

> * * * The nature of the work, its purpose and character are precisely the same whether every other spur is to be worked, only those between the classification yard and the interchange track or only those, or one of them, between the interchange track and the end of the lead track. * * *

This is not accurate. The operation is clearly different when cars are being continually coupled and uncoupled. Moreover, this consideration by the court of what other trains may do on the same track at other times fails to deal with the decision of this Court in *Northern Pacific*, *supra*, 254 U.S. 251, in which trains other than those in question likewise made stops along the route, and in which the point was diligently argued by the railroad (O.T. 1920, No. 88, Resp. Br. 7). There the tracks, over which this Court required power-brake operation, had a switchyard, not merely spurs, *along* its route, but this Court observed (254 U.S. at 253):

> * * * The switching, assembling and classification of cars for its through and local freight is done in the Rice's Point yard where there are fifty-five tracks, each four thousand feet long and at Furnace, where there are fifteen tracks, cars are also switched and assembled. At Berwind and Boston, two intermediate points, where there are respectively nine and six tracks, cars are frequently set out or picked up by transfer trains. *The transfer trains here in question appear to have run solid between Rice's Point and Furnace.* * * * [Emphasis added.]

Thus it is clear that in *Northern Pacific* the rule was laid down that the controlling factor was what the train in question was doing, and not, as held in the decision below, what other operations might do in the same place at other times. In the actual movements in issue here, *none* of the intervening spurs was worked. The situation, moreover, was not even one in which a train moved for the purpose of making numerous pickups and by reason of unexpected contingencies went on through. Here, the runs were, from the outset, known to be through runs, pursuant to the advance instructions issued (*supra*, p. 7). The brake lines could be connected without concern that the train would constantly be broken up or reassembled. The movement was, in the usual sense of the word, the operation of a train.

C. IT IS IMMATERIAL THAT THE RUN WAS NOT OVER A MAIN LINE AND WAS WITHIN YARD LIMITS

The opinion below ascribes to Congress an intention (R. 68)—

> to distinguish between an over-the-line run, during which the need of useful train brakes was great and obvious and compliance with the requirement would not unduly hinder railroad transportation, and switching operations, during which there is little or no need for train brakes and general and strict compliance with the requirement would be impossible or highly impractical.[21] * * *

[21] The court also speaks of "the distinction between the fast, through train and the simplest switching operation" (R. 68), and refers to "movements between major terminals" (R. 68), "over-the-line" runs (R. 67), and "main-line tracks" (R. 68–69).

The majority does not deal with, or distinguish, the unequivocal language of this Court in *United States* v. *Northern Pacific Ry. Co.*, *supra*, 254 U.S. 251, discussed *supra* (pp. 36–37), in which the Court was squarely confronted with the railroad's contention that the trackage used was not part of the railroad's "main" line.[22] This Court, after observing some respects in which the dangers of the particular trackage were in any event equivalent to those of a main line, proceeded to the broad and unconditioned language (254 U.S. at 254):

> But there is nothing in the act which limits the application of the provision here in question to operations on main line tracks. The requirement that train brakes shall be coupled so as to be under engine control is in terms (32 Stat. 943) applicable to "all trains * * * used on any railroad engaged in interstate commerce." * * *

This Court, in all its decisions, refused to treat as one yard what was in actuality a group of separate switching areas connected by tracks, or to treat as a mere switching operation a substantial unbroken run of an assembled chain of cars over such tracks between the actual switching areas (*supra*, pp. 30–39). In one holding (*Louisville & Jeffersonville Bridge Co.* v. *United States*, *supra*, pp. 33–36), the distance was only three-quarters of a mile, yet the Court rejected the euphemism "a circumscribed area used for switching

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[22] As observed by Chief Judge Sobeloff below (R. 77), the Court of Appeals whose holding (*United States* v. *Northern Pacific Ry. Co.*, 255 Fed. 655 (C.A. 8)) was reversed by this Court in the *Northern Pacific* decision took the approach now taken by the majority below. See, particularly, 255 Fed. at 657–658.

purposes" (249 U.S. at 535). But the opinion below considers it significant that the track here "is a part of the Hopewell Yard, and serves no purpose other than the distribution of cars" (R. 65). There is no significance in the fact that the deliveries of the trains were made to industrial plants.[23] Nor is there any statutory exemption of movements on trackage merely because the trackage originates at a switchyard and, like every track, has spurs at points along its route. The Fourth Circuit below recognizes that the actual work of breaking up and assembly of the instant trains was done "in the classification yard" (R. 65), but nevertheless treats the track winding through the town of Hopewell for two miles as merely a part of some superimposed yard.

Whether or not the entire area included within "yard limits" could be considered part of a railroad "yard" for other purposes,[24] the inclusion of such an extended area within "yard limits" cannot entitle the railroad to an exemption of all operations within that area from the Safety Appliance Act on the ground that they constitute "switching." This

[23] Moreover, as observed by Chief Judge Sobeloff (R. 75), this Court, by its approval of the decision in *United States* v. *Pere Marquette Railroad*, 211 Fed. 220 (W.D. Mich.), showed that a transfer train may consist of a train of cars transported to be unloaded as well as further forwarding. *United States* v. *Erie R.R. Co.*, 237 U.S. 402, 409.

[24] The Standard Code of Operating Rules adopted by the Association of American Railroads (Revised to October 1, 1953) defines "Yard" as follows (p. 11): "A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by timetable, or by train order, may be made, subject to prescribed signals and rules, or special instructions."

Court, in *United States* v. *Erie R.R. Co.*, 237 U.S. 402, 409, approved the holding of a lower court in *United States* v. *Pere Marquette Railroad*, 211 Fed. 220 (W.D. Mich.), which specifically dealt with operations within "yard limits."[25] And more recently the Court of Appeals for the Second Circuit applied the Act to the South Buffalo Railway, whose operations were described by the court as follows (*United States* v. *South Buffalo R. Co.*, 168 F. 2d 948, 949, certiorari denied, 335 U.S. 870):

> Its entire system of trackage is operated as a single yard. All of its crews are yard crews and they are paid at yard rates applicable to yard switching services. Through trains do not pass over its tracks. It does not have any block signal system and all its movements are made at slow speeds with a member of the crew stationed at the forward end of the locomotive so that he can see sufficiently far ahead to enable the movement to be brought to a stop within one-half of the range of his vision. All of its operating income and expenses is at the express direction of the Interstate Commerce Commission, classified as switching income and expenses.

When an area is not in fact utilized for taking trains apart, sorting out the cars, and putting them together again, the fact that it is included within "yard limits"

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[25] The description of the operations in *United States* v. *Northern Pacific Ry. Co.*, 254 U.S. 251, 252-253, makes it appear that they must have occurred within yard limits although the Court does not specifically so state. The Court of Appeals had stated in its opinion that "The yards along this 'D.T.' track are all operated as one yard." *United States* v. *Northern Pacific Ry. Co.*, 255 Fed. 655, 657 (C.A. 8).

for operating or rate purposes has no significance for safety appliance purposes.

As is noted above, *supra*, pp. 37–39, the standard of what is a "train" is a simple one and the recent decisions attempting to assess the danger in any particular factual setting disregard the standard clearly established by this Court. The courts below, instead of applying that standard, have attempted to use as criteria matters referred to by this Court in collateral explanation of the congressional purposes or in meeting assertions of litigant railroads. Arguments as to danger or lack of danger should be addressed to Congress and not to the courts. Nevertheless, it is appropriate to point out that, even in assessing this element, the majority opinion below fails to take into consideration the purposes of Congress, as revealed by the legislative history discussed *supra*, pp. 21–28.

We take issue with the assumption below that while on an "over-the-line run" there is need for power brakes, on the unbroken two-mile run through the town of Hopewell (which the majority would exempt), there is "little or no need" for power brakes, and that compliance with the statutes would be "impossible or highly impractical" (R. 68). The short answer to the alleged impossibility or impracticability of compliance is that the respondent did comply for four and one-half years, until its own *ex parte* determination that "there was no undue or unusual risk" (*supra*, p. 5). The expense of compliance and the alleged danger to employees coupling the power brakes was clearly a matter that had been brought before the Congress in its deliberations and had obviously been

found to be outweighed by the dangers of running trains without brakes on the cars (S. Rep. No. 1930, 57th Cong., 1st Sess., p. 71; 24 Cong. Rec. 1366–1367; 36 Cong. Rec. 2521–2522).

The discussion of danger in the opinion below does not deal at any point with the danger to the train crew in a long train of unbraked cars being stopped in a cumulative chain-reaction of cars jolting forward through the slack. Yet this was one of the serious dangers envisaged by the Congress (*supra*, pp. 23–25). Moreover, we do not agree with the reasoning below (R. 71) that "[w]hether or not a car has been placed upon a particular spur, the risk of collision with vehicular traffic at Randolph Street, and the other crossings, is precisely the same" (R. 71). If comparison is properly made between a train of many cars going along on a mile or two-mile run, as against a unit that is not a train (*i.e.*, an engine switching only one or a few cars for a short distance), the likelihood of accident even at grade crossings is not "precisely the same." As is suggested above, *supra* (p. 25), an engine's brakes can stop one, or a few, unbraked cars within a shorter distance than it can stop a whole train of twenty-three or more cars, and that difference can mean the difference between a fatality or the safety which the Congress sought to achieve.

The congressional effort was an effort to use every reasonable means of decreasing the hazards. Congress necessarily could rely only on general measures. In certain conceivable individual situations an engine and single car traveling only a few feet can, of

course, be lethal. But Congress was clearly convinced that a train, without brakes in operation upon a minimum percentage of its cars, was always potentially dangerous, and Congress wrote no exception into the statute for the various cases in which one or more of the dangers might be less serious. It did not exempt trains going less than a certain rate of speed, or trains moving in supposedly safeguarded areas, or trains having some special purpose such as transporting cars from one yard or terminal to another. "Switching operations" as such, as held by this Court, are exempt only when performed in such small units for such short distances as to be outside the concept of the run of a "train." No such small units or operations were here involved. The movements were plainly runs of "trains."

CONCLUSION

For the above reasons, we respectfully submit that the judgment of the court below should be reversed.

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